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Nos. 03-867 and 03-882

In the Supreme Court of the United States

CF INDUSTRIES, INC., *Petitioner v.* UNITED STATES OF AMERICA, *Respondent*

AND

THOMSON INC., F/K/A THOMSON MULTIMEDIA INC., *Petitioner, v.* UNITED STATES OF AMERICA, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* HITACHI HIGH TECHNOLOGIES AMERICA, INC., THE MARKETING STORE WORLDWIDE, L.P., AND TEAC AMERICA, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE "CHARMING BETSY" DOCTRINE PROVIDES THAT AN INTERPRETATION AND APPLICATION OF A STATUTE WHICH WOULD RESULT IN A VIOLATION OF THE UNITED STATES' INTERNATIONAL OBLIGATIONS IS TO BE AVOIDED 3

II. AS A TAX ON IMPORTS, THE HMT VIOLATES THE UNITED STATES' COMMITMENTS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1947) 4

III. THERE IS NO CLEAR EXPRESSION OF CONGRESS' INTENT TO ENACT A GATT-INCONSISTENT HMT. THE COURT SHOULD THEREFORE PRESUME THAT CONGRESS WOULD NOT HAVE ENACTED THE HMT IN VIOLATION OF THE UNITED STATES' GATT OBLIGATIONS AND, THEREBY, HOLD THAT THE HMT ON EXPORTS IS NOT SEVERABLE 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 4

Amoco Oil Company v. United States, 63 F. Supp. 2d 1332 (Ct. Int'l Trade 1999) 9

Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) 7,9

Fundicao Tupy S.A. v. United States, 652 F. Supp. 1538 (Ct. Int'l Trade 1987) 7

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 3

Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804) 3

Thomson Multimedia Inc. v. United States, 340 F.3d 1355 (Fed. Cir. 2003) 10

United States v. Dion, 476 U.S. 734 (1986) 7

United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd sub nom. United States v. United States Shoe Corporation*, 523 U.S. 360 (1998) 3, 4, 6, 7

Weinberger v. Rossi, 456 U.S. 25 (1982) 7

STATUTES:

26 U.S.C. § 4461 ..... 2, 4, 6

LEGISLATIVE MATERIALS:

Hearing on the Admin.'s Harbor Services Fee Proposal and Harbor Services Fund Proposal Before the House Subcomm. on Water Resources & the Envn't of the Committee on Transportation and Infrastructure, 106th Cong. 44 (1999) (statement of Dr. Joseph W. Westphal, Asst. Sec. of the Army (Civil Works)).... 6

Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 31 (1985) 8

S. Rep. 99-126 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639 ..... 5, 6

H.R. Rep. 99-228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705. 6

H.R. Rep. No. 99-251, Pt. IV (1985) *as contained in* H.R. Rep. 99-228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705. ..... 6, 8

H. Conf. Rep. 99-1013 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723. 6

INTERNATIONAL AGREEMENTS:

General Agreement on Tariffs and Trade (1947) 2, 6

OTHER MATERIALS:

European Comm'n, *Report on United States Barriers to Trade and Investment – 2002* (Nov. 2002) 6

Request for Consultations, *United States-Harbor Maintenance Tax*, DS118 (W.T.O. Feb. 16, 1998) 6

Restatement (Third) Foreign Relations Law of the United States (1987) 3

STATEMENT OF INTEREST[1]

Hitachi High Technologies America, Inc., The Marketing Store Worldwide, L.P., and TEAC America, Inc., *amici curiae* in this appeal, respectfully submit this brief in support of CF Industries, Inc. and Thomson Inc. Both petitioners and the respondent have consented in writing to the filing of this brief.

Hitachi High Technologies America, Inc. of Schaumburg, Illinois, is an importer of semiconductor manufacturing equipment, analytical instrumentation, scientific instruments, bio-related products, industrial equipment, information equipment, electronic devices, and electronic and industrial materials.

The Marketing Store Worldwide, L.P. of Oakbrook Terrace, Illinois, is a large volume importer that provides promotion and marketing services to multinational corporations.

Finally, TEAC America, Inc. of Montebello, California, an importer of advanced recording equipment, is the largest subsidiary of Tokyo-based TEAC Corporation, a billion-dollar global corporation and a world leader in recording technology for over four decades.

As significant U.S. importers who have paid several million dollars in Harbor Maintenance Taxes ("HMT"), *amici curiae* have an interest in the outcome of this appeal. *Amici curiae* agree with petitioners that the unconstitutional

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[1] Pursuant to S. Ct. Rule 37.6, *amici curiae* state that no counsel for any party to this case authored this brief in whole or in part and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

HMT's export provisions are not severable from the statute's import provisions.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case contained in CF Industries, Inc.'s and Thomson Inc.'s Petitions for *Writs of Certiorari*.

SUMMARY OF ARGUMENT

A long-standing canon of statutory construction known as the *Charming Betsy* doctrine provides that an interpretation of a statute which violates the United States' international obligations is to be avoided. In this instance, there is little dispute that the HMT (26 U.S.C. § 4461), in its current form, violates the United States' commitments under the General Agreement on Tariffs and Trade 1947 ("GATT"). Given this prohibition, in order for the Court to uphold the HMT, it must determine that Congress expressed a clear intent to enact the HMT knowing the statute would conflict with the United States' international obligations.

Review of the legislative history to the HMT shows that there is no clear expression of Congress' intent to enact a GATT-inconsistent statute. The Court should therefore presume, based on the *Charming Betsy* doctrine, that Congress would not have enacted the HMT had it known that the statute would violate U.S. GATT obligations. The HMT's export provisions are therefore not severable from the statute's import provisions.[2]

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[2] Although *amici* address just Question 1 presented in Thomson Inc.'s petition for a *writ of certiorari*, we agree with both petitioners that the HMT is a "tax" and not a user fee and therefore unconstitutional under the Uniformity and Port Preference Clauses of the U.S. Constitution. *See* Thomson Pet. at 16-30; CF Indus. Pet. at 8-29.

ARGUMENT

I. THE "CHARMING BETSY" DOCTRINE PROVIDES THAT AN INTERPRETATION AND APPLICATION OF A STATUTE WHICH WOULD RESULT IN A VIOLATION OF THE UNITED STATES' INTERNATIONAL OBLIGATIONS IS TO BE AVOIDED.

From nearly its inception, this Court has recognized that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Otherwise known as the *Charming Betsy* doctrine, this principle of statutory interpretation serves as the basis for the presumption that "Congress does not intend to repudiate an international obligation of the United States . . . by nullifying . . . an international agreement . . . or making it impossible for the United States to carry out is obligations." Restatement (Third) Foreign Relations Law of the United States, at 64 (1987) (emphasis added).

As discussed in detail in Petitioner Thomson Inc.'s Petition for *Writ of Certiorari*, a primary issue before this Court is "[w]hether the export provisions of the HMT, which this Court held unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), are not severable from the statute's import provisions, which Congress enacted together with the export provisions as part of a legislative compromise." Importantly, "whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526

U.S. 172, 191 (1999) (emphasis added) citing *Regan v. Time Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion).

As this Court has recognized, "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (italics original; underscoring added). The sole question before this Court on the issue of severability is, therefore, whether, in the context of the *Charming Betsy* doctrine, the HMT statute created in the absence of the export provisions is legislation that Congress would not have enacted. Because there is no clear expression of Congressional intent to enact a GATT-inconsistent HMT statute, the *Charming Betsy* doctrine counsels the Court to conclude that the unconstitutional provisions are not severable.

II. AS A TAX ON IMPORTS, THE HMT VIOLATES THE UNITED STATES' COMMITMENTS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1947).

Although the U.S. Court of Appeals for the Federal Circuit held that the HMT was a "user fee," this Court has held that "Congress expressly describe [the HMT] as 'a *tax* on any port use.'" *United States Shoe*, 523 U.S. at 367 (emphasis added) (quoting 26 U.S.C. § 4461(a)). In addition, in enacting the HMT, Congress consistently referred to, and thereby recognized, the HMT as a "tax."

For example, the Senate Environment & Public Works Committee Report states that the Senate version of the Water Resources Development Act (the legislative vehicle for the HMT) assessed a "cargo tax:"

> The bill sets this cargo tax on the value of the commercial cargo loaded or unloaded. The tax in Title 8 is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and it is to be paid by the owner of the cargo, or his agent.

S. Rep. 99-126, at 9 (1985).

Similarly, the House Conference Report also refers to imposition of a "port use tax:"

> Imposition of tax. -- The House bill imposes an excise tax on the use of a U.S. harbor or channel ("port") by a commercial vessel for loading or unloading of commercial cargo.
>
> Applicability of tax. -- The port use tax does not apply with respect to:
>
> * * *
>
> Payment of tax. -- The tax is payable by the . . . importer . . . . The tax is imposed only once with respect to transportation of any cargo on the same vessel.
>
> Administration of tax. -- The port use tax is to be administered and enforced by the

> U.S. Customs Service in a manner similar to customs duties.

H. Conf. Rep. 99-1013, at 228-230 (1986); *See*, S. Rep. 99-126 at 9-10, 129, 131, 133, 135 (1986) (describing HMT as tax); H.R. Rep. 99-228, at 228-31 (1986); H.R. Rep. 99-251, at 1-4, 7-14 (1985); S. Rep. 99-126, at 2-4, 9-10, 115, 129, 133 (1985).

GATT Article VIII:1(a) specifically provides that "fees and charges . . . shall not represent . . . a taxation on imports." In addition, although GATT Article II:2(c) permits the assessment on imports of "fees or other charges," such fees or charges must be "commensurate with the cost of services rendered." This Court has recognized, however, that "Congress expressly described [the HMT] as 'a *tax* on any port use . . . ." *United States Shoe*, 523 U.S. at 367 (emphasis added) (quoting 26 U.S.C. § 4461(a)). In addition, this Court held that "the tax . . . is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee." *United States Shoe*, 523 U.S. at 363.

Furthermore, several countries, led by the European Union, have requested GATT consultations with the United States to discuss the United States' HMT-related violation of GATT Articles I, II, III, VIII, and X. *See* Request for Consultations, *United States-Harbor Maintenance Tax*, DS118 (W.T.O. Feb. 6, 1998) and European Comm'n, *Report on United States Barriers to Trade and Investment – 2002* (Nov. 2002). In addition, subsequent to this Court's ruling in *United States Shoe*, the Clinton administration transmitted to Congress a proposal to replace the HMT with a Harbor Services Fee. *See Hearing on the Admin.'s Harbor Service Fee Proposal and Harbor Services Fund Proposal Before the House Subcomm. on Water Resources & Envn't,*

of the Committee on Transportation and Infrastructure, 106th Cong. 44 (1999) (statement of Dr. Joseph W. Westphal, Asst. Sec. of the Army (Civil Works)) (acknowledging that, after this Court's decision in *United States Shoe*, "GATT has a serious problem with [the HMT] . . . [which] is now only being applied to imports."). Accordingly, the HMT as a tax on imports, subsequent to this Court's holding that the HMT was unconstitutional as applied to exports, violates the United States' GATT commitments.

III. THERE IS NO CLEAR EXPRESSION OF CONGRESS' INTENT TO ENACT A GATT-INCONSISTENT HMT. THE COURT SHOULD THEREFORE PRESUME THAT CONGRESS WOULD NOT HAVE ENACTED THE HMT IN VIOLATION OF THE UNITED STATES' GATT OBLIGATIONS AND, THEREBY, HOLD THAT THE HMT ON EXPORTS IS NOT SEVERABLE.

As discussed above, the sole question before the Court on the issue of severability is whether the HMT statute created in the absence of the HMT on exports is legislation that Congress would not have enacted. In answering this question, it is essential to first recognize that "some affirmative expression of congressional intent to abrogate the United States' international obligations is required . . . ." *Weinberger v. Rossi*, 56 U.S. 25, 32 (1982). "What is essential is clear evidence that Congress actually . . . intended action on the one hand and [] treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-740 (1986). *See also*, *Fundicao Tupy S.A. v. United States*, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987) ("An interpretation and application of the statute which would

conflict with the GATT Codes would clearly violate the intent of Congress."); *Federal Mogul Corp. v. United* States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) ("GATT Agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.") (emphasis added).[3]

Upon review of the legislative history to the HMT, there is no clear expression by Congress that it would have implemented the HMT statute knowing that the statute would conflict with the United States' GATT obligations. Rather, the legislative history indicates that Congress enacted the HMT statute in its original form to specifically avoid a conflict with GATT obligations.

For example, a report issued by the House Merchant Marine and Fisheries Committee recognized a possible conflict with the United States' GATT commitments by noting that "if the proposed levy is construed to be a revenue-raising measure, there is the possibility of either a GATT claim or the threat of retaliation by individual trading partners." H.R. Rep. No. 99-251 (1985). In addition, a witness testifying before the House Ways and Means Committee stated that "imposing [the HMT] only on imports would present significant GATT problems, and for that reason alone it was decided to impose the [HMT] on both exports and imports and on movement on the inland waterways." *Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985*: Hearing

[3] It is important to recognize that a successful challenge of the HMT under the GATT could result in the assessment of "retaliatory" duties on U.S. origin products, which would severely weaken the international competitiveness of U.S. exporters.

Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 31, at 37 (1985).

In contrast, the U.S. Court of International Trade believes "the issue is not whether an HMT on imports alone violates the GATT, but whether Congress was so fearful of negative GATT implications that it would not have enacted the HMT on imports without the HMT on exports." *Amoco Oil Company v. United States*, 63 F. Supp. 2d 1332, 1337 (Ct. Int'l Trade 1999). As the basis for this decision, the Court of International Trade correctly recognized that Congress possesses the authority to pass laws which conflict with the United States' international obligations. *Id.* However, what the Court failed to recognize is that the *Charming Betsy* doctrine provides that "an act of Congress ought never to be construed to violate the law of nations" and, therefore, "absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations." *Federal Mogul Corp. v. United* States, 63 F.3d 1572, 1581.

The test to be applied is, therefore, not whether Congress was "fearful of negative GATT implications." Rather, the test is whether the HMT on imports conflicts with the United States' international obligations and, if so, whether there was a clear expression of Congressional intent to enact the HMT on imports with the knowledge that the statute would conflict with these international obligations.

As established above, the HMT on imports does, in fact, conflict with the United States' international obligations. In addition, there is no clear expression by Congress of its intent to enact the HMT on imports with the knowledge that the statute would conflict with the United States' international obligations. Indeed, as the legislative history discussed above indicates, Congress carefully crafted the

HMT to *avoid* any conflict with GATT, by making it applicable to exports and imports alike. The HMT on exports is, therefore, not severable. Accordingly, the Court should hold that the U.S. Court of Appeals for the Federal Circuit's decision on severability, which relied heavily on the Court of International Trade's decision in *Amoco Oil Company*, was in error. *See Thomson Multimedia Inc. v. United States*, 340 F.3d 1355 (Fed. Cir. 2003).

CONCLUSION

For the reasons stated above, *amici curiae* Hitachi High Technologies America, Inc., The Marketing Store Worldwide, L.P., and TEAC America, Inc. respectfully request that the petition of CF Industries, Inc. and Thomson Inc. be granted.

Respectfully submitted,

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